



Volume 56 | Issue 3

Article 4

2011

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Recommended Citation

Arthur T. Downey, *Deviations from the International Rule of Law: An Historical Footnote*, 56 Vill. L. Rev. 455 (2011).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol56/iss3/4>

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2011]

DEVIATIONS FROM THE INTERNATIONAL RULE OF LAW:
AN HISTORICAL FOOTNOTE

ARTHUR T. DOWNEY*

IN John F. Murphy's acclaimed 2004 book, *The United States and the Rule of Law in International Affairs*,¹ he notes that the United States has engaged in "deviations" from the rule of law, and that some scholars cite treaties—such as the International Criminal Court, the Kyoto Treaty, or the Law of the Sea Convention—that the United States rejected despite overwhelming support from most other countries, including close U.S. allies. This is a serious charge leveled at America. But then, Professor Murphy quite correctly reminded his readers that such a charge is not well-founded—a position that took courage, since it was not politically correct. His reminder was clear:

In the voluntarist system that characterizes the international legal process, each state is entitled to decide whether becoming . . . a party to a particular treaty is in its national interest. Its failure to do so . . . is not inconsistent with the rule of law in international affairs. Indeed, if there are compelling reasons for a state not to become a party to a treaty, its refusal to sign the treaty supports the rule of law.

With that as background, and in the context of the sesquicentennial of the beginning of the American Civil War, this paper reviews a bit of relevant American diplomatic and legal history from the mid-nineteenth century.

In the mid-1850s, the United States declined to enter into a multilateral convention dealing with maritime matters during wartime, specifically because the convention included a prohibition on the practice of privateering (the grant of "Letters of Marque and Reprisal"), the preservation of which was considered to be in America's best interests. According to some, as Professor Murphy noted, that United States position could be classed—incorrectly—as a "deviation" from the international rule of law. Only several years later, however, during the first year of the Civil War, this United States position put the Union in an awkward position, as the Confederate States of America began to commission privateers—or "pirates," as the Lincoln Administration termed them. This awkwardness demonstrates that the assessment of what is in the "compelling national interest" can change rather quickly and in entirely unforeseen ways.

* Portions of this paper appear in Chapter 6 ("The War at Sea: International Law and Diplomacy") of ARTHUR T. DOWNEY, *CIVIL WAR LAWYERS: CONSTITUTIONAL QUESTIONS, COURTROOM DRAMAS AND THE MEN BEHIND THEM* (2010).

1. See JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 349 (2004).

I. WHAT ARE PRIVATEERS?

A Letter of Marque and Reprisal was an official warrant or commission from a government authorizing the designated agent to seize or destroy specified assets belonging to another party that had committed some offense under the “law of nations,” the older term for “international law.” A Letter of Marque usually was used by a government to authorize privateers to raid and capture merchant shipping of an enemy nation. Absent such specific state authorization, the individuals involved in raiding and capture would be understood to be pirates.² A Letter of Marque, meaning “frontier” in French, authorized the agent to pass beyond the borders of the nation. It was considered a retaliatory measure short of a full declaration of war. It was part of maritime economic warfare, and it was a sort of “guerilla warfare at sea.”³ Public navies were expensive and they had to be maintained in peacetime as well as in wartime, and so governments relied heavily on private initiative and enterprise to fight their wars. The system worked because it was backed by a substantial array of laws, including prize courts and bond requirements.

To the modern eye, the idea of “privatizing” maritime warfare—commissioning private persons whose investors and crew looked to gain profits from prizes—might seem strange, even leaving aside the fact that the United States seems to have almost as many private “security” contractors in Iraq and Afghanistan today as it has soldiers. Two centuries ago, however, the fundamental notion of relying on private entities to engage in sovereign-like activities was more the norm. Consider the Dutch East India Company, established in the early seventeenth century, to carry out colonial activities in Asia (chiefly in Indonesia) and possessing quasi-governmental powers including authority to wage war, negotiate treaties, coin money, etc. The Dutch West India Company, chartered shortly after, was granted control of an area from West Africa to the Caribbean. Perhaps the most prominent of such entities was the British East India Company, which ruled India from 1757 until 1858, exercising military power and governmental administration. The Crown took over the governing functions in India after the Sepoy Mutiny of 1857, and the Company lost its quasi-governmental functions.

A. *A History of Privateering*

The first Letter of Marque issued in England dates from the late thirteenth century, but only after 1585 did the letters make provisions for prizes to be condemned and confiscated by an Admiralty Court with a

2. Whether piracy is a crime against international law seeking only a court with jurisdiction to apply that law (the “naturalist” position) or whether piracy is solely a municipal law crime (the “positivist” position) is discussed in Professor Murphy’s latest book. See JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 76 (2010).

3. CRAIG L. SYMONDS, *THE CIVIL WAR AT SEA* 61 (2009).

subsequent division of the goods made between the Crown and the privateer. Privateers had a romanticized⁴ history: In the late 1580s, the British Crown issued a Letter of Marque to Sir Francis Drake (1588) and to Sir Walter Raleigh whose main source of income came from privateering. More than a century later, Edward Teach was a British privateer during Queen Anne's War (1702-1713), but he turned to buccaneering (piracy) after the war, and was then known as the infamous Blackbeard the Pirate.⁵

During the American Revolution, the American colonials were up against the great sea power of the British Navy. In November 1775, Massachusetts legislated an Act Authorizing Privateers and Creating Courts of Admiralty, which permitted the arming of private vessels to attack and to take into any port in the colony any vessels employed by the enemy.⁶ The Continental Congress issued about 800 Letters of Marque, legalizing and commissioning private enterprises to outfit and send out armed merchant ships as commerce raiders. One of the first commissions was signed on October 24, 1776, by John Hancock, as President of the Continental Congress.⁷ These ships were given the legal authority to prey on British shipping. In Boston alone, some 365 vessels were commissioned as privateers during the Revolutionary War. In contrast, the Continental Navy had only about one hundred ships of war. As one scholar put it:

[The Continental Army] won by not losing; or, in the manner of modern guerilla insurrections, by making the cost of victory too high to seem worth it to a complacent, superior foe. Privateers, on the other hand, carried the war to Britain. Many were plain bandits; some were genuine patriots.⁸

After the Revolutionary War, the concept of granting Letters of Marque was expressly recognized in the United States Constitution: Article I, Section 8 gives Congress the power "[t]o declare War [and] grant Letters of Marque and Reprisal,"⁹ and Article I, Section 10 prohibits any state from granting Letters of Marque and Reprisal.

4. Rhett Butler, in *GONE WITH THE WIND*, was a Confederate privateer. See MARGARET MITCHELL, *GONE WITH THE WIND* (1936).

5. The English tradition in the early nineteenth century was captured brilliantly in PATRICK O'BRIAN, *THE LETTER OF MARQUE* (1988).

6. See ROBERT H. PATTON, *PATRIOT PIRATES: THE PRIVATEER WAR FOR FREEDOM AND FORTUNE IN THE AMERICAN REVOLUTION* 27 (2008).

7. Shortly after the outbreak of the revolution in April 1775, the Provincial Congress—the forerunner of the Continental Congress—authorized the Colonies to grant Letters of Marque to private ships.

8. PATTON, *supra* note 6, at xviii-xix.

9. Letters of Marque were also mentioned in the Articles of Confederation—specifically, in Article VI: “nor shall any State grant . . . letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, . . . unless such State be infested by pirates.” ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 5. Article IX also vested in Congress assembled the sole and exclusive right “of granting letters of marque and reprisal in times of peace . . .” ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1. Nevertheless, Article IX fur-

The apogee¹⁰ of the issuance by the United States of Letters of Marque occurred during the War of 1812 in the context of the weak United States Navy against the mighty British sea power—David against Goliath¹¹. Congress declared war on Britain on June 18, 1812, and specifically authorized the President “to issue to private armed vessels of the United States commissions of marque and general reprisal, in such form as he shall think proper . . . against the vessels, goods, and effects of the Government of the [] United Kingdom . . . and the subjects thereof.”¹² On June 26, 1812, Congress passed An Act Concerning Letters of Marque, Prizes and Prize Goods to regulate the privateers. The United States commissioned 526 vessels as privateers, though only about half that number actually went to sea.¹³ The United States Navy’s ships were captured or bottled up in port after 1813, and so it was left to the privateers to encourage Britain to terminate the War, since British ship owners and insurance companies suffered heavy losses after American privateers began operating in British waters.

After the War of 1812, particularly after 1814, when King Ferdinand VII was restored to the Spanish throne, Spain tried to stop the revolutionaries in its South American colonies from pressing their independence. Those South American revolutionaries found support in United States seaports, especially in New Orleans and Baltimore. Agents from “independent” South American countries would arrive and distribute commissions to privateers: from Cartagena (now Colombia), Buenos Aires (Argentina), or the Oriental Republic (Uruguay). Many of the United States sailors were veterans of privateering for the United States against Britain, and looked to South American privateering as a quick way to repair their finances, as well as to support the cause of independence. The United States neutrality laws of 1794 and 1797, however, made it a crime to engage in hostilities against any nation at peace with the United States.

ther provides that “Congress assembled shall never . . . grant letters of marque or reprisal in time of peace . . . unless nine States assent to the same . . .” ARTICLES OF CONFEDERATION of 1781, art. IX, para. 6.

10. As military technology developed, substitution between private and military use became more difficult, and navies became more economic and easier to monitor—and so privateering declined.

11. For a discussion of the laws of war and of prizes and United States privateers during the War of 1812, see Frederick C. Leiner, *A Ruse de Guerre Gone Wrong: The Sinking of the Eleanor*, 101 MD. HIST. MAG. 167 (2006). The situation discussed in the article ended in a unanimous Supreme Court decision in 1817. See *The Eleanor*, 15 U.S. (2 Wheat.) 345, 358 (1817) (finding that “no one act is proven in the case which did not comport with the fair, honorable, and reasonable exercise of the rights of war”). Francis Scott Key was one of the lawyers who argued the case.

12. An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof, and the United States of America and Their Territories, ch. CII, 2 Stat. 755, 755 (1812).

13. A Baltimore schooner, the *Mammoth*, commissioned on March 7, 1814, was one of the most successful privateers, taking twenty-four prizes. Two of her journals are in the library of the Maryland Historical Society.

Moreover, in the United States-Spanish Treaty of 1795, the United States agreed to treat as pirates anyone who violated American neutrality to attack Spain.¹⁴ Enforcement was not very effective, even after Congress revised the Neutrality Act.¹⁵

In late 1835, the Texas Revolutionary Assembly considered how to protect the Texas coast. Since it was not possible to create overnight a Republic of Texas Navy, the Texans issued Letters of Marque to protect the coast, harass Mexican shipping, and bring in prizes—part of whose proceeds would go to the Texas public treasury.¹⁶ During the United States-Mexican War (1846-1848), the United States did not issue any Letters of Marque; Mexico did, but the result was ineffective.

The potential use of Letters of Marque and Reprisal arose in this twenty-first century in a somewhat different context: Congressman Ron Paul, who ran for President in 2008 and has formally announced his candidacy for the 2012 election, introduced a bill (HR 3076) on October 10, 2001, entitled the September 11 Marque and Reprisal Act of 2001. It authorized the President

to commission, under officially issued letters of marque and reprisal, so many of privately armed and equipped persons and entities as, in his judgment, the service may require . . . to employ all means reasonably necessary to seize outside the geographic boundaries of the United States . . . the person and property of Osama bin Laden [and] of any al Qaeda co-conspirator . . . responsible for the air piratical aggressions . . . perpetrated upon the United States

14. The treaty, known as the Treaty of San Lorenzo, which came into force in August 1796, settled the United States boundaries, but also provided in Article XIV:

Nor shall any citizen, subject, or Inhabitant of the said United States apply for or take any commissions or letters of marque for arming any ship or ships to act as privateers against the subjects of his Catholic Majesty, or the property of any of them from any prince or state with which the said king shall be at war. And if any person of either nation shall take such commissions or letters of marque he shall be punished as a pirate.

Treaty of Friendship, Limits and Navigation, U.S.-Spain, art. XIV, ¶ 2, Oct. 27, 1795, 8 Stat. 138, 146 [hereinafter Treaty of San Lorenzo].

15. The progression of the Neutrality Act is: Act of March 3, 1817, 3 Stat. 370; Act of April 20, 1818, 3 Stat. 447; Act of May 15, 1820, 3 Stat. 600. "Between 1816 and 1820, government agents in Massachusetts, Virginia, Maryland, North Carolina, South Carolina, and Georgia arrested at least 129 men on charges of piracy for commandeering vessels and attacking neutrals [T]he courts found thirty-one guilty of piracy [and] seven were executed." See David Head, *Baltimore Seafarers, Privateering, and the South American Revolutions, 1816-1820*, 103 MD. HIST. MAG. 269, 282 (2008).

16. Texas issued a total of six letters to privateers. Overall, the privateering effort was disappointing, since Mexican shipping was not a rich trade, and so relatively few privateers were willing to take the risk.

The bill also provided for the posting of a security bond before a Letter of Marque could be issued. The bill did not survive the Committee on International Relations. On July 27, 2007, Paul introduced HR 3216, the Marque and Reprisal Act of 2007, which was essentially the same as the 2001 bill, and it suffered the same fate. In April 2009, Paul suggested the use of Letters of Marque and Reprisal as a solution to the problem of Somali pirates.

A professor at the United States Naval Academy has suggested that the United States might today issue Letters of Marque against non-state actors like terrorist organizations, drug cartels, or even those engaging in illegal fishing. He suggested a more modern term: “contracts of marque.”¹⁷

II. UNITED STATES EFFORTS TO CODIFY INTERNATIONAL LAW OF MARITIME WARFARE

From its beginning, the United States strongly favored the principles of freedom of the seas. The United States had international commercial interests, but no longer had the protection of the British Royal Navy. In September 1776, the Continental Congress adopted the first American official position on maritime rights during wartime. Known as the Treaty Plan of 1776, it set out four principles:

1. Citizens of a neutral could trade with the enemies of a belligerent (except in contraband);
2. Citizens of a neutral could trade with the enemies of a belligerent (except for contraband) not only from enemy ports to neutral ports, but also between ports of an enemy;
3. Enemy contraband found on neutral ships could not be confiscated by the belligerent (“free ships make free goods”); and
4. Neutral goods (including contraband) found on enemy vessels could be confiscated.

The Founders assumed that, in wartime, the country would have to depend on neutral vessels to handle American commerce, since the American Navy would never be large enough to take on that task. Therefore, these principles were very much in the United States’ interests. They were contained in the first American treaty, the 1778 Franco-American Treaty of Amity and Commerce, although the French later ignored them. Britain refused to be bound by these liberal maritime principles.

The Anglo-French wars early in the nineteenth century put special focus on the rights of neutrals and belligerents, since the Americans were

17. Lieutenant Claude Berube, *Contracts of Marque*, 133 PROCEEDINGS MAG., Nov. 2007, at 10 (suggesting modern term for employing private naval companies).

the chief neutral suppliers to both belligerents, and each of the belligerents wanted to prevent neutrals from trading with its enemy. And then there was the War of 1812, which, in part, related to freedom of the seas, and during which the United States, as a belligerent, paid strict attention to the rights of neutrals. Over the next several decades, the United States entered into treaties with many Latin American republics and with Prussia incorporating the liberal 1776 maritime principles; the United States was unsuccessful in getting the United Kingdom to so commit.

A. *Franklin Pierce and William Marcy*

The presidential election of 1852 was interesting in several respects. This was the last gasp for the Whig Party whose candidate, General Winfield Scott, suffered an electoral defeat of 254 to 42. Selecting the Democratic Party candidate was not easy. At the Baltimore convention in June, there were four major contenders: Stephen A. Douglas, William L. Marcy, James Buchanan, and Lewis Cass.¹⁸ The four deadlocked. But then on the forty-ninth ballot, a relatively obscure former Senator from New Hampshire, Franklin Pierce, leapt ahead of the four favorites to win the nomination, and then the Presidency. Pierce took office March 4, 1853.

In a move not unlike the “team of rivals”¹⁹ that Lincoln assembled, Pierce selected Marcy to lead his Cabinet as Secretary of State. (Pierce sent Buchanan to London as the United States Minister to the Court of St. James.) Marcy had been an Associate Justice of the New York Supreme Court, Governor of New York for three terms, and Secretary of War under President Polk. In foreign policy, Pierce and Marcy displayed traditional Democratic assertiveness: interest in detaching Cuba from Spain, opening Japan to United States trade, and narrowing the UK role in Central America. The first quarter of Pierce’s First Annual Message to Congress on December 5, 1853, dealt with foreign affairs. Just four months later, Europe was immersed in the Crimean War.

B. *The Crimean War*

France and Britain declared war on Russia on March 28, 1854. The war pitted France, Britain, and the Ottoman Empire (along with the Kingdom of Sardinia and the Duchy of Nassau) against the Russian Empire.²⁰ The United States declared its neutrality. Both France and Britain announced at the beginning of the Crimean War that they would follow the

18. Four years later, Buchanan became the Democratic nominee, and then President; Cass served as Buchanan’s Secretary of State. Jefferson Davis was his Secretary of War. Pierce’s Cabinet remained unchanged for all four years, the only time in United States history when this stability obtained.

19. DORIS KERNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* (2005).

20. The population of Russia at that time (74 million) was greater than the combined populations of France and Britain; Russia’s losses were almost three times the combined losses of France and Britain.

principle that “free ships make free goods,” but that it would be observed only during the conflict.²¹

Pierce and Marcy decided that this French/British position gave the United States an opportunity to try to make that doctrine a principle of international law by enshrining it in a multilateral treaty. The American proposition would embrace the rule of “free ships make free goods, except for contraband,” but would add to it the idea that neutral property (other than contraband) on enemy ships would be exempt from confiscation. Secretary of State Marcy instructed all United States diplomatic posts in Paris, London, St. Petersburg, and elsewhere to propose such a treaty—so as to lock in these liberal principles as a matter of the law of nations. Russia acted promptly, and on July 22, 1854, Secretary Marcy negotiated and signed in Washington with the Russian *charge d'affaires* a Convention for the Rights of Neutrals on the Sea.²² After Senate action, it entered into force on November 1, 1854.²³ The convention expressly looked forward to the accession of other countries. Russia and the United States enjoyed a good relationship, in large part because each saw the other as an ally against the potential efforts of Great Britain to partition the Russian Empire and to thwart American expansion.²⁴

The Kingdom of Prussia expressed interest in a treaty based on the Marcy instructions. Prussia, however, threw in a monkey wrench: it proposed an additional article renouncing privateering. The President and the Secretary were unhappy at this prospect. Pierce explained it quite clearly in his Second Annual Message to Congress of December 4, 1854:

If [abolishing privateering] were adopted as an international rule, the commerce of a nation having comparatively a small naval force would be very much at the mercy of its enemy in case of war with a power of decided naval superiority. The bare statement of the condition in which the United States would be

21. The Anglo-French *modus vivendi* also provided that neither would issue Letters of Marque.

22. The convention laid out two principles: (1) free ships make free goods, i.e., goods of a belligerent (except contraband) are free from confiscation on neutral vessels; and (2) property of neutrals on board a belligerent vessel (except contraband) are not subject to confiscation. See Convention Relative to the Rights of Neutrals at Sea, U.S.-Russ., July 22, 1854, 10 Stat. 1105 (recognizing “indispensable conditions of all freedom of navigation and maritime trade”).

23. See *United States Treaty with Russia*, N.Y. TIMES, Nov. 7, 1854, at 1.

24. In April 1861, the U.S. Minister to Russia reported to Washington on his meeting with the Foreign Minister, Prince Gortchacow, relating to not recognizing the newly formed Confederate States of America. The Prince explained that the Emperor strongly supported the Union position in part because it “was the only commercial counterpoise in the world . . . to Great Britain, and Russia would do nothing, therefore, to diminish its just power and influence.” Dispatch from John Appleton, U.S. Minister at St. Petersburg, to Secretary of State Seward (April 8-20, 1861), in PAPERS RELATING TO FOREIGN AFFAIRS ACCOMPANYING THE ANNUAL MESSAGE OF THE PRESIDENT TO THE SECOND SESSION THIRTY-SEVENTH CONGRESS 299 (Kraus Reprint Corp. 1965) (1861).

placed, after having surrendered the right to resort to privateers, in the event of war with a belligerent of naval supremacy will show that *this Government could never listen to such a proposition.* (emphasis added)

Just in case anyone missed his point, Pierce went on to explain that the British Navy²⁵ was at least ten times as large as the United States Navy, even though the commerce of the two nations was about the same size. Therefore, without resort to privateers—Pierce used the term “our mercantile marine”—the British could inflict injury on United States commerce tenfold greater than that which the United States could retaliate. Pierce said that to give up the right to privateers would be the equivalent of giving up the right to enlist volunteers for the Army: when the United States has to engage in war, “it confidently calls upon the patriotism of its citizens . . . to augment the Army and the Navy so as to make them fully adequate for the emergency.”

By December of 1855, President Pierce was able to announce that Nicaragua and the Kingdom of Hawaii had acceded to the declaration of neutral maritime principles contained in the United States-Russia convention of the year before.²⁶ As to neutral rights and obligations, the central issue at that time was the attempts by the United Kingdom to draw recruits from the United States for service in the war against Russia. Pierce vigorously asserted that United States law prevented United States citizens from enlisting in the service of any foreign state, including as a sailor “on board any vessel or war, letter of marque or privateer.”

C. *The Congress of Paris*

This “congress” was a peace conference held in Paris among France, Britain, the Ottoman Empire, Sardinia, Russia, Austria, and Prussia. Russia yielded to peace negotiation after Austria, on February 1, 1856, threatened to enter the Crimean war on the side of the Allies, and after the 1855 death of Nicholas I and his replacement by Alexander II. The negotiations resulted in the Treaty of Paris, signed on March 30, 1856, which formally ended the war, maintained the integrity of the Ottoman Empire, and neutralized the Black Sea.²⁷

25. Pierce did not refer to Great Britain by name, but used the term “the navy of the first maritime power in Europe.” See President Franklin Pierce, Second Annual Message to Congress (Dec. 4, 1854), available at <http://millercenter.org/scripps/archive/speeches/detail/3729>.

26. See President Franklin Pierce, Third Annual Message to Congress (Dec. 31, 1855), available at <http://millercenter.org/scripps/archive/speeches/detail/3730>.

27. Russia repudiated these Black Sea provisions in 1870.

D. *The Declaration of Paris*

The delegations that had worked out the peace arrangements ending the Crimean War remained in Paris and they drew up the Declaration of Paris which was signed on April 16, 1856, by Britain, France, Austria, Russia, Prussia, Sardinia, and the Ottoman Empire. It was the first multilateral effort to codify in time of peace rules which were applicable in time of war. The United States was not present during the negotiations.

The preamble of the Declaration noted that maritime law in time of war had long been the subject of “deplorable disputes,” and the “uncertainty of the law and of the duties . . . gives rise to differences of opinion between neutrals and belligerents.” Accordingly, the Declaration contained four principles, which included:

2. The neutral flag covers enemy’s goods, with the exception of contraband of war;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy’s flag; and
4. Blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient to prevent access to the coast of the enemy.

These provisions were gratifying to the United States, because they embody the liberal principles for which the United States had for so long campaigned; and, principles 2 and 3 were the exact principles that the United States had suggested two years earlier. The fourth principle was unobjectionable.

But, the first principle was a stumbling block. It provided—with deceptive simplicity—that: “Privateering is and remains abolished.” It reflected a view by the parties that private armed ships too often ventured far from home and beyond the reach of the regular naval forces, and so it was too hard to keep them under control. Of course, the parties—particularly the French and British—had large naval forces and so their need for privateers was not great, and the existence of privateers of other countries needlessly put Anglo-French commercial interests at risk. The Declaration obligated parties to the treaty not to issue Letters of Marque commissioning privateers; but, it did not obligate them to treat privateers commissioned by non-party nations as outlaws (international criminals).

E. *The United States Reaction*

The four principles in the Declaration were viewed by the parties as indivisible, and so the United States could not accede to the Declaration’s three other principles without also accepting the difficult first principle abolishing privateering. While noting that the right of privateering was “of essential importance” to countries such as the United States without large public navies, Secretary Marcy also took the generous position that

the parties to the Paris Declaration presumably were really only aiming to protect private property: that private property on the ocean, though it might belong to citizens of a belligerent state, should be exempt from capture. Marcy then proposed an amendment to the first principle that outlawed privateering by adding the clause: "and that the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by the public armed vessels of the other belligerent, except be it contraband." If so amended, the United States could accede to the Declaration of Paris,²⁸ because its fundamental goal of protecting private commercial property would be safeguarded. Marcy sent this proposal to American diplomatic posts, and presented it in a note to the French legation in Washington.

Not surprisingly, the Emperor of Russia approved the United States position and undertook to try to get the other parties to the Declaration of Paris to agree. But, the consultation among the parties took time. And the United States was out of time to devote to foreign affairs. Domestic issues dominated: the slavery issue had broken out in violence, Kansas was "bleeding," political sectionalism was robust, and threats of secession grew louder. In complete contrast to his previous three Annual Messages to Congress, President Pierce devoted the entire first half of his Fourth (and final) Message to those painful domestic issues. The presidential candidate of the newly formed Republican Party lost the election in the fall of 1856, and Democrat James Buchanan, Pierce's Minister in London for four years, took the Presidential oath of office in March 1857. The new Secretary of State, Lewis Cass, instructed American diplomats to suspend discussions on the American maritime proposal until the President had time to study the issues.²⁹ But, of course, domestic issues increasingly took Buchanan's attention and the discussions remained suspended indefinitely.³⁰

In short, the United States did not accede to the 1856 Declaration of Paris, and so the abolition of privateering was not an obligation of the United States.³¹ In the eyes of some critics of America, as Professor Mur-

28. President Pierce explained all of this in his Fourth [and last] Annual Message to Congress on December 2, 1856. See President Franklin Pierce, Fourth Annual Message (Dec. 2, 1856), *available at* <http://millercenter.org/scripps/archive/speeches/detail/3731>.

29. Former Secretary of State Marcy died a few months later.

30. Buchanan and Pierce are usually ranked among the least effective presidents in United States history.

31. During the United States-Spanish War, both countries agreed to abide by the principles of the 1856 Paris Declaration; President McKinley issued such a proclamation on April 21, 1898. As a consequence of merchant vessels being used in combatant fleets during the Russo-Japanese War in 1904—especially the Russian merchant fleet moving through the Bosphorus and Dardanelles—the Second Hague Conference of 1907 produced a Convention VII Relating to the Conversion of Merchant-Ships into War-Ships, which dealt with the problem, for example, by requiring that merchant ships transformed into combatants bear the distinctive signs of their war service. That reflected a more gentlemanly era of naval warfare.

phy noted, the United States position—refusing to join a treaty widely supported by allies—might be termed a “deviation” from the international rule of law. The rationale put forward by President Pierce and Secretary Marcy, however, suggests that the United States refusal to accede was a wise exercise of sovereign rights in the compelling interests of the United States; their refusal was actually in support of the rule of law.

III. HISTORY’S IRONY: CIVIL WAR PRIVATEERS—OR, WERE THEY PIRATES?

Almost exactly four years after President Buchanan entered the White House, the situation in the United States was quite different. On April 15, 1861, following the fall of Fort Sumter, President Lincoln formally announced the existence of an “insurrection” and called for volunteers to deal with the problem. From the South’s perspective, this looked like a call for an invasion by the North. In response, Jefferson Davis, President of the Confederate States of America (CSA), on April 17, issued a proclamation calling for volunteers to defend the new nation. He then invited “all those who may desire, by service in private armed vessels . . . , to aid this government” by applying for Letters of Marque and Reprisal. The private armed vessels were to capture and harass Northern merchant ships at sea. Because the CSA had no navy, this proposition made great sense: the privateers could challenge the Union immediately, while real CSA Navy vessels were being bought or built.

The CSA Constitution provided that Congress had the power to “grant letters of marque and reprisal, and make rules concerning captures on land and water.”³² On May 6, 1861, the CSA Congress passed the appropriate legislation,³³ after which Davis began to issue letters commissioning privateers. He was careful to follow the law exactly, knowing that—to gain international recognition—the CSA had to be seen to be acting in accordance with law. The law established administrative procedures for the issuance of letters, requiring, for example, a bond, a list of investors, and the names of the captain and crew. Davis’s instructions to the newly commissioned privateers were to proceed “with all justice and humanity” toward Union vessels. A privateer which captured a prize vessel had to bring the prize into a properly constituted court for adjudication, and the privateer had to prove that the enemy owned the vessel. If the prize was found lawful, the vessel was sold at a court-ordered auction. After taxes, the proceeds were to be divided among the crew and investors. Under traditional international law, a properly commissioned privateer enjoyed the protection of the laws of war, and so, if captured, the crew was entitled to honorable treatment as prisoners of war.

32. CONST. OF THE CONFEDERATE STATES OF AM. art. I, § 8, cl. 11 (1861).

33. See Act of May 6, 1861, 13 Stat. 70 (“An Act Recognizing the existence of war between the United States and the Confederate States, and concerning Letters of Marque, prizes and prize goods.”)

The first vessel to receive a CSA Letter of Marque was the privateer the *Savannah*, on May 18, 1861.

A. *Lincoln's Response*

Two days after Jefferson Davis's April 17 Proclamation, Lincoln issued another Proclamation announcing a blockade, but also directly addressing the CSA threat of privateers. Lincoln explained that insurrectionists had threatened to issue "pretend" Letters of Marque, and therefore: "if any person, under the pretended authority of said States, . . . shall molest a vessel of the United States . . . , such person will be held amendable to the laws of the United States for the prevention and punishment of piracy." Thus, Lincoln made it plain that those in the South who wanted to take the risks of entering into privateering, now also had to weigh the fact that the Union would treat them as pirates.³⁴

Queen Victoria, on May 13, 1861, issued a Proclamation of Neutrality on the "hostilities [which] have unhappily commenced between the Government of the United States and certain States styling themselves as the Confederate States of America." Two weeks later, in accordance with the obligations of a neutral, Britain announced that it would forbid the armed ships, "and also the privateers, of both parties from carrying prizes made by them into the ports . . . of the United Kingdom, or any of Her Majesty's Colonies or possessions abroad."³⁵ In quick succession, France, Belgium, Holland, Spain, Portugal, and other European powers issued similar positions of neutrality. These actions made Confederate privateering more difficult, because prizes could no longer be brought into British or Spanish ports in the Caribbean; their only welcoming ports would be in the CSA itself, and that required running the treacherous Union blockade. The number of privateers being commissioned began to dwindle.

On the other hand, the British were outraged at Lincoln's announcement that the Union would treat properly commissioned CSA privateers as pirates. The Lord Chancellor opined that if the United States put to death a privateer with a proper Letter of Marque, the United States would be guilty of murder. Needless to say, the British reaction complicated the position of the Lincoln Administration.

In July 1861, Union naval forces captured crews from two CSA privateers—the *Savannah* and the *Jefferson Davis*—and they were imprisoned in New York and Philadelphia, respectively, to be tried for piracy. Shortly thereafter, Jefferson Davis wrote to Lincoln and proposed to exchange the crews of the privateers for an equal number of Union soldiers being held

34. On May 22, before the news of the Queen's Neutrality Proclamation reached Washington, Seward instructed the United States Minister in London, Charles Francis Adams (the son and grandson of American Presidents) to tell the British with respect to the proposed Union treatment of privateers "that this is a question exclusively our own. We treat them as pirates."

35. 3 June, 1861 PARL. DEB., H.C. (3d ser.) (1861) 471 (announcing dispatch of June 1, 1861, followed by additional instructions on June 2).

as prisoners of war by the Confederacy. To underscore the point, Davis explained that if the privateers were hanged ("a barbarous act"), then Davis would order that an equal number of Union prisoners would be hanged in retaliation. Lincoln, of course, did not reply in order to avoid any hint of recognition of the Confederacy. The privateers were tried in October: in Philadelphia the crew from the *Jefferson Davis* was convicted of piracy, but in New York the crew from the *Savannah* was not convicted due to a hung jury. The CSA Secretary of War, Judah P. Benjamin ordered that Union prisoners from the battle of Bull Run be removed from prisoner of war camps and put into jails pending execution if the CSA privateers were hanged.

The uncomfortable, but very clear, message was received in Washington. Congress adopted a Joint Resolution³⁶ requesting the President to create a system for the exchange of prisoners. Within several months, the privateers from New York and Philadelphia were released in a general exchange, and they were greeted with acclaim in Charleston. No more CSA privateers were tried for piracy.

B. *Back to the Declaration of Paris: Renewed American Diplomacy*

Following the dueling Proclamations of Davis and of Lincoln in mid-April 1861 relating to privateering, Secretary of State William Seward—who, twenty years earlier, ironically, had succeeded former Secretary William Marcy as Governor of New York—decided that American diplomacy should get to work to ensure that the United States could accede to the 1856 Declaration of Paris, specifically including its first principle by which privateering would be abolished.

Accordingly, on April 24, 1861, Seward sent a lengthy circular instruction to the American Ministers in Great Britain, France, Russia, Prussia, Austria, Belgium, Italy, and Denmark.³⁷ He reviewed the original 1854 Pierce/Marcy proposal for the adoption of two principles, and the conclusion of the 1856 Declaration of Paris. He faithfully explained the reasons for the rejection by Pierce/Marcy of the first principle abolishing privateering, the counter-proposal by them for a broad private property amendment to the first principle, and the suspension of further consideration when the Buchanan Administration came into office in March 1857 and was consumed by domestic issues.

Seward then instructed the Ministers to find out whether their host governments would be willing to negotiate the United States accession to the Declaration of Paris. Seward added—for the information of the Ministers only—that President Lincoln supported the amendment proposed by

36. See H.R.J. Res. 37th Cong. (1861) (enacted). The Dix-Hill Cartel of July 22, 1862 was the first formal agreement between the two sides. Exchanges terminated a year later.

37. Secretary Seward's circular instruction was included among the Papers Relating to Foreign Affairs Accompanying the President's Message to Congress at the Opening of Its Session in December 1861.

Secretary Marcy, but acknowledged that “the right season seems to have passed” for that option. Nevertheless, since the insurrectionists in the South proclaimed a “resolution to invite privateers to prey upon the peaceful commerce of the United States,” the President was persuaded that, under these circumstances, “it is wise to secure the lesser good offered by the Paris congress, without waiting indefinitely in the hope to obtain the greater one [that had been offered by Pierce/Marcy].” In other words, we want to abolish privateering, even if it means a total reversal of the previous United States position on the 1856 Declaration of Paris.

The diplomacy became complicated by the formal Neutrality Proclamation of Britain and others, and also because France and Britain agreed to act jointly with respect to decisions relating to neutrality in the American Civil War.³⁸ By early August, however, the British had agreed in principle to the idea of United States accession to the Paris Declaration “pure and simple.” The Foreign Secretary, Lord Russell, however, explained, “[T]he engagement [of treaty obligations] will be prospective, and will not invalidate anything already done.”³⁹ The British then increased the pressure: the United Kingdom and other parties to the Declaration of Paris planned to issue, at the time of the United States accession, an accompanying written declaration stating that “Her Majesty does not intend thereby to undertake any engagement which shall have any bearing, direct or indirect, on the internal differences now prevailing in the United States.” Charles Francis Adams, the United States Minister in London, told the British that this proposition was “novel and anomalous.”⁴⁰ The American envoy, viewing this step as almost an insult, formally declined to “fix a day for proceeding in the negotiation.”⁴¹

The timing of this tough new British position was significant. It was presented just after the news finally reached London—in those pre-trans-Atlantic telegraph days—that the Union had imprisoned the Confederate privateer crews from the *Savannah* and the *Jefferson Davis* and intended to try them as pirates and hang them when convicted. It was one thing for Lincoln to state in late April 1861 that he intended to treat as pirates any “prospective” privateers the CSA might commission, though at that point no privateers had yet been commissioned; Lincoln’s Proclamation might have been no more than a bluff. But now, in the late summer, the fact of

38. The British-French “understanding” that they would act in concert on matters of the United States Civil War was not at first communicated directly to the United States. Rather, the United States learned of it through a report from the United States legation in St. Petersburg. Message of Secretary of State Seward to William L. Dayton, United States Minister in Paris (June 17, 1861). There was also some confusion as to whether the United States-British discussions were to be located in Washington (as between Lord Lyons and Secretary Seward) or in London (as between Minister Charles Francis Adams and Lord Russell).

39. Dispatch from Secretary Seward to Charles Francis Adams, United States Minister in London (Aug. 17, 1861).

40. Note from the American Legation to Lord Russell (Aug. 23, 1861).

41. *Id.*

privateers being treated as pirates was unambiguous and spoke otherwise. Moreover, the “facts on the ground” were informative: the Union had badly lost the first major battle of the war in the disaster of Bull Run⁴² in July 1861; what had been generally assumed in the North (and by diplomats)—that the North would crush the rebellion within ninety days—was clearly now wrong.⁴³ The United Kingdom, and therefore France too, could not be seen to be inserting itself into this very delicate issue which would be inconsistent with its neutrality—especially if the Confederacy might win. And it was now far from certain that the Confederacy would be crushed, so why risk alienating a potential new country? In a formal note to Minister Adams on August 28, 1861, Lord Russell laid out the British position with great clarity:

It would certainly follow logically and consistently [in light of British neutrality] that the so-called Confederate States, being acknowledged as a belligerent, might, by the law of nations, arm privateers, and that their privateers must be regarded as the armed vessels of a belligerent.

With equal logic and consistency it would follow, from the position taken [by Lincoln], that the privateers of the southern States might be decreed to be pirates, and it might be further argued by the government of the United States that [Britain, after signing with the United States a treaty] declaring that privateering was and remains abolished, would be bound to treat the [CSA] privateers as pirates.⁴⁴

Lord Russell could foresee that this conflict would surely lead to charges of “bad faith” between the United States and United Kingdom (and France, and other signatories) with respect to the treatment accorded to CSA privateers. The Foreign Secretary explained further that he had originally planned to make this statement verbally. In the end, however, he considered it would be “more clear, more open, more fair to Mr. Adams to put the declaration in writing, and to give notice of it to Mr. Adams before signing the convention.”⁴⁵

In light of the British-French position, Secretary Seward understood that by acceding to the Declaration of Paris under these conditions, the Union would gain nothing. By the end of September, Seward had advised American diplomats of the problematic negotiations. Typical was the message from Seward to the United States Minister in Turin in which Seward

42. The battle of Bull Run (as it was known in the North), or Manassas (as it was known in the South), took place on July 21, 1861.

43. For the impact of Bull Run, see generally JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* ch. 11 (1988).

44. Note from Lord Russell to Charles Francis Adams, United States Minister in London (Aug. 28, 1861).

45. *See id.*

placed the blame elsewhere for the “failure of negotiations with enlightened powers for the advancement of the interests of peace and humanity.”⁴⁶ Finally, in November, Seward instructed United States diplomats to “let the matter rest” in light of the British-French position to “which the United States cannot yield.”⁴⁷

At year’s end, Lincoln began his first Annual Message to Congress by noting that a “nation which endures factious domestic division is exposed to disrespect abroad.”⁴⁸ The only oblique mention of the failure of Seward’s effort with respect to the Declaration of Paris was to note that “we have failed to induce some of the commercial powers to adopt a desirable melioration of the rigor of maritime war.”⁴⁹ However, in that same message, Lincoln also signaled that he was not planning to treat privateers as pirates.⁵⁰

After the Civil War, the Supreme Court offered a perspective on the questions of whether Confederate vessels were properly treated as pirates. Just a month after the war began, a Confederate ship seized a private vessel (the *Marshall*) at the mouth of the Mississippi River and claimed her as a prize. The owner of the *Marshall* had the year before taken out an insurance policy to protect against the “adventures and perils of the sea,” which specifically included “pirates” and “assailing thieves.” However, expressly excluded from the insurance coverage was “loss . . . arising from capture.” The owner of the *Marshall* sued the insurance company to cover his loss. The question was whether the taking of the ship by the naval forces of the Confederacy was a “capture”; if it was, the loss was not one of the perils insured against, and the owner could not recover under the insurance policy.

The Supreme Court decided during the December Term, 1867, that this was a capture.⁵¹ The opinion, written by Justice Samuel Nelson, noted several cases involving capture by privateers.⁵² Nelson described the core issue as whether the Confederate government, under whose authority the taking was made, was a de facto government—not whether it was a lawful government. Nelson found the Confederacy to have been a government

46. Dispatch from Secretary of State Seward to Minister George P. Marsh (Sept. 22, 1861).

47. Dispatch from Secretary of State Seward to Minister George P. Marsh (Nov. 22, 1861).

48. President Abraham Lincoln, First Annual Message to Congress (Dec. 3, 1861), *available at* <http://www.infoplease.com/t/hist/state-of-the-union/73.html>.

49. *See id.*

50. *See id.* Lincoln said that, rather than capturing “pirates,” it would be “more effectual” if the United States Navy would focus its efforts on recapturing the prizes, which they might have taken. *Id.*

51. *See Mauran v. Ins. Co.*, 73 U.S. (6 Wall.) 1 (1867).

52. This included an old English case by Lord Mansfield, the greatest English jurist of the eighteenth century, involving the capture of a neutral vessel by an English privateer. Also included was a United States Supreme Court case from 1818 involving privateers commissioned by South American colonies of Spain as part of their struggle for independence.

in fact, possessing the supreme power in the territory in which its jurisdiction extended; indeed, the United States government conceded (or acquiesced in) the exercise of belligerent rights in “the treatment of captives, both on land and sea, as prisoners of war, and dealt with them accordingly.”⁵³

While this was a relatively narrow insurance policy case, it demonstrates the difficulties surrounding the Union’s effort to avoid legal recognition of the Confederacy, while at the same time treating Confederate soldiers and sailors—including privateers—as belligerent prisoners of war.

Even more interesting is the array of participants in that case. The opinion was written by Justice Samuel Nelson,⁵⁴ who presided over the 1861 New York case of the privateer/pirate crew from the *Savannah*, which resulted in a hung jury; he also wrote the blistering dissent in the most important case decided by the Supreme Court during the Civil War, *The Prize Cases*,⁵⁵ involving the lawfulness of the blockade. The dissent in the insurance case was written by Chief Justice Salmon P. Chase and Justice Noah H. Swayne, the last and the first Supreme Court appointees of President Lincoln, respectively. The lawyer for the insurance company—the winning party—was Benjamin P. Curtis, the former Justice of the Supreme Court who had delivered the famous dissent in the *Dred Scott* case ten years earlier, after which he resigned from the Court.⁵⁶ Finally, a brief writer for the ship owner—the losing side—was Richard Henry Dana who had argued the winning side in *The Prize Cases*, and was the author of *Two Years Before the Mast*.⁵⁷

IV. IN SUM

This brief review reveals America as an international law activist in mid-1854. It was then that the United States tried to seize the opportunity presented by the Crimean War to advance its interests in protecting maritime commerce during wartime by expanding and codifying international law. Unfortunately, this resulted only in minor bilateral successes, perhaps understandable when the attention of the major European powers was focused on that bloody war. Not being at the negotiating table in Paris just after the congress that ended the Crimean War, the United States was at a disadvantage when the 1856 Declaration of Paris was concluded. The

53. *Mauran*, 73 U.S. (6 Wall.) at 14.

54. Nelson and Secretaries of State Marcy and Seward were all New Yorkers.

55. *The Prize Cases*, 67 U.S. (1 Black) 635 (1862).

56. Though a strong Unionist, in late 1862, Curtis attacked the Preliminary Emancipation Proclamation as being beyond the power of the President. Apart from appearing as an advocate in more than forty Supreme Court cases, Curtis served as co-counsel for the defense in the Senate trial of President Andrew Johnson.

57. For Dana’s role in *The Prize Cases*, see Jeffrey L. Amestov, *The Supreme Court Argument that Saved the Union: Richard Henry Dana, Jr., and The Prize Cases*, 35 J. OF S. Cr. Hist. 10 (2010).

United States was faced with a treaty agreed to by most of the major maritime countries, but which required the abolition of privateering. Because the United States had only a small navy, accepting such an obligation would have amounted to a form of unilateral naval disarmament. With some courage, therefore, including perhaps facing a charge by some that the United States was “deviating” from the international rule of law, the United States rejected the treaty. Its rationale was compelling. Nevertheless, the United States offered a counter-proposal that would have yielded the position on privateering for a broader protection of private property.

If only there had not been a change of administrations in the United States (Pierce to Buchanan), and if the domestic tensions over slavery had not diverted all energy from the new Buchanan Administration’s foreign policy, the United States might have been able to negotiate a liberal amendment to the Declaration of Paris which would have protected United States interests and advanced international law at the same time. The somewhat disingenuous efforts of Secretary Seward in the spring of 1861 to bring to bear the weight of the international community against Confederate privateering proved unsuccessful in the face of the neutrality adopted by Britain and France, among others.

In short, this episode—this historical footnote—reflects Professor Murphy’s position that nations do not deviate from the international rule of law when they decline to enter into a treaty obligation in the face of contrary and compelling national interests.

